Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BOHEMIAN DISTRIBUTING COMPANY,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

FRANK ROTHMAN
CHRISTINA A. SNYDER
WYMAN, BAUTZER, ROTHMAN,
KUCHEL & SILBERT
Two Century Plaza
2049 Century Park East
Los Angeles, California 90067

Attorneys for Petitioner

Of Counsel:
GEORGE MIRON
CAROL S. MENDELSOHN

QUESTIONS PRESENTED

1. Does section 2 of the Twenty-first Amendment, which grants the States the right to control importation and sale of liquor and to structure its distribution, authorize California to enact and enforce a "primary source" law, *i.e.*, a law which prohibits a licensed importer from importing branded liquor into California unless authorized to do so by the owner of the brand?

2. Does California's primary source law, Assembly Bill 499, conflict with the Sherman Act, even though it does not require any person to engage in any conduct which would violate the Sherman Act?

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation, doing business as GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE, doing business as SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE, doing business as TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR., and SHIRLEY D. KIRBY, doing business as HOUSE OF FINE SPIRITS,

Petitioners,

vs.

BAXTER RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Respondent.

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation, and BOHEMIAN DISTRIBUTING COMPANY, a California corporation,

Intervenors.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States: Your Petitioner, Bohemian Distributing Company, respectfully prays for a Writ of Certiorari to the Court of Appeal, Third Appellate District, of the State of California to review the judgment and opinion of that court entered on July 17, 1980. Petition for hearing was denied by the Supreme Court of the State of California on September 24, 1980.

OPINIONS BELOW

The opinion of the Court of Appeal, Third Apellate District, of the State of California (Appendix A, *infra*) is

officially reported as *Norman Williams Co. v. Rice*, 108 Cal.App.3d 348, 166 Cal.Rptr. 563 (1980). The order of the Supreme Court of the State of California denying petitioner's timely petition for hearing has not yet been reported. A copy of this order is set forth in Appendix B, *infra*.

JURISDICTION

The judgment of the Court of Appeal, Third Appellate District, of the State of California was entered on July 17, 1980, granting the petition for writ of mandate. Thereafter, on September 24, 1980, the Supreme Court of California denied a petition for hearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of the Twenty-first Amendment (U.S. Const. Amend. XXI § 2) is set forth in Appendix C, *infra*. Pertinent portions of the Sherman Act (15 U.S.C. § 1 *et seq.*) are set forth in Appendix D, *infra*. Pertinent portions of the California Business and Professions Code, including Assembly Bill 499 (Stats.1979, ch. 280, § 1; Cal. Bus. & Prof. Code § 23672 (West Supp. 1980), are set forth in Appendix E, *infra*. Pertinent portions of the Oklahoma Statutes (12 Okla. Stat. tit. 37, § 501 *et seq.*) are set forth in Appendix F, *infra*. Pertinent portions of the Kansas Statutes (Kan. Stat. § 41-101 *et seq.*) are set forth in Appendix G, *infra*.

STATEMENT

This petition seeks review for the purpose of correcting significant errors made by the California Court of Appeal in *Norman Williams Co. v. Rice*, 108 Cal.App.3d 348, 166 Cal. Rptr. 563 (1980), wherein the court below held invalid California's "primary source law," which, like similar laws in 15 other states and the District of Columbia, regulates the class of

persons who may import branded liquor into the state.[1] The court below, purportedly relying upon this Court's recent decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), held that California's primary source law, enacted in 1979, conflicts with the Sherman Act (15 U.S.C. § 1 *et seq.*), and that said primary source law is preempted by federal law. This holding by the court below was erroneous. If this error is not corrected, citizens of California will be deprived of their rights under the Twenty-first Amendment to adopt legislation regulating liquor and fostering competition among different brands of liquor sold in California.

Petitioner Bohemian Distributing Company ("Bohemian"),[2] an intervenor in the proceeding below, here prays that its petition be granted, and that the decision below be reversed, based upon two cases decided by this Court within the past year. The first case, *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (hereafter referred to as *"Midcal"*), decided prior to the case below, affirmed the California Court of Appeal's holding to the effect that a state may not require price-fixing conduct of merchants in interstate commerce. As shown herein, *Midcal* nonetheless reserves to the states their Twenty-first Amendment right to maintain virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system within the state. The second relevant decision of this Court is *Colby Distributing Co., Inc. v. Lennen*, 227 Kan. 179, 606 P.2d 102 (1980), *appeal dismissed sub nom. Grant-Billingsley Liquor Co. v. Lennen*, 49 U.S.L.W. 3331 (U.S. Nov. 4, 1980) (No. 80-189) (hereafter referred to as *"Grant-Billingsley"*). The *Grant-Billingsley* case was decided subsequent to *Midcal* and the case below.

In *Grant-Billingsley*, appellants sought to overturn a Kansas Supreme Court decision, decided prior to the decisions in *Midcal* and in the case below. The Kansas Supreme Court

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[1] The primary source laws of other states and the District of Columbia are cited in Appendix H, *infra*.

[2] Petitioner is a licensed importer and wholesaler of distilled spirits in California.

had *upheld* a statute imposing extensive control over intra-brand competition, in addition to a primary source requirement like the one in California. (The Kansas legislation is set forth in Appendix F, *infra.*) Kansas, prior to the enactment of the legislation challenged in the state court, had been an "open wholesaling" state. The statutory change to a primary source scheme was expressly enacted to *introduce* competition into the state. See discussion in *Colby Distributing Co., Inc. v. Lennen,* 227 Kan. at 187, 606 P.2d at 103-104. The Kansas Supreme Court recognized the state's authority to regulate the importation and distribution of liquor pursuant to the Twenty-first Amendment and upheld the validity of the primary source statute.

As a result of this holding, an appeal was taken by certain Kansas liquor distributors arguing that those portions of the Kansas legislation which dealt with the distribution of liquor (e.g., those permitting exclusive territories) conflicted with the Sherman Act. In support of their appeal, these liquor distributors cited the California Court of Appeal's opinion in the case below, *Norman Williams Co. v. Rice,* which had been decided subsequent to the Kansas Supreme Court's decision, as authority for the proposition that there was a conflict between Kansas' primary source legislation and the Sherman Act, urging that, as a consequence, a substantial federal question was present. This Court summarily rejected appellants' argument, concluding that there was "no substantial federal question," and thus upholding the validity of the primary source legislation. Based upon the decisions in *Grant-Billingsley* and *Midcal,* there should be no dispute that the court below erroneously decided *Norman Williams Co. v. Rice* wherein California's primary source law was held to be invalid.

The pertinent facts as they relate to California's primary source law, Assembly Bill 499 ("A.B. 499"), Cal. Bus. & Prof. Code § 23672 (West Supp. 1980), are as follows: A.B. 499 was enacted by the California legislature in 1979 to resolve an ambiguity in California law which resulted from the decision of the Supreme Court of California in *Rice v. Alcoholic Beverage Control Appeals Board,* 21 Cal.3d 431, 579 P.2d 476 (1978). That decision, which invalidated section 24755 of the California Business and Professions Code on the ground that the minimum

resale price scheme it imposed on the distribution of liquor in California was in conflict with the Sherman Act, created an ambiguity in the predecessor-statute of A.B. 499, section 23672 of the California Business and Professions Code, in that section 23672 specifically referred to section 24755.

While section 23672 merely delineated what classes of liquor licensees were authorized to function as importers of liquor into California, it defined an "authorized importer" to be any person designated by "the licensee who filed the minimum price schedule for such brand pursuant to Section 24755." Because section 24755 had been declared to be invalid, California's Department of Alcoholic Beverage Control claimed it could not enforce section 23672 following *Rice*, since it could not perform legislative functions and interpret who was an "authorized importer" pursuant to section 23672.

To resolve this issue and to restore its intention that only certain designated importers have the right to distribute liquor in California, the California legislature in 1979 adopted a new law, A.B. 499. A.B. 499 was patterned after similar "primary source" laws in at least 15 other states and the District of Columbia. The object of primary source laws—including those in Kansas and California—is to aid revenue collection, insure orderly marketing of liquor in the states where enacted and to promote competition between different brands of liquor by facilitating agreements between a distiller and its wholesalers whereby the wholesalers are allocated sales territories for a particular brand of liquor. Primary source laws thereby limit the privilege to import a brand of alcoholic beverage to the owner of the brand or to those who have been designated by the owner of the brand.[3]

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[3] Primary source laws are not related to resale price maintenance laws. Some jurisdictions, such as the District of Columbia (D.C. Alco. Bev. Control Bd., tit. 3, Ch. 1 § 4.11) and Texas (Tex. Alco. Bev. Code Ann. § 37.10 (Vernon)), have long had primary source laws and no price control laws. Other jurisdictions, such as Massachusetts (Mass. Gen. Ann. Laws. ch. 138, §§ 25B, 25C (West Supp. 1979)), had resale price maintenance laws, but no primary source laws. A comparison of primary source laws and price maintenance laws is set forth in tabular form in Wine and Spirits Wholesalers of America, Inc., 1976-1979 Cumulative Supplement to The Three-Tier System of Distribution in the Wine and Spirits Industry (November 1979).

The 1979 California primary source law, A.B. 499, provides as follows:

> "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Such distilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee."

The instant case arose in the court below because following the *Rice* decision in 1978 and before the passage of A.B. 499 in 1979, certain persons, including the petitioners below (hereinafter sometimes referred to as "Norman Williams Company"), took advantage of the California Department of Alcoholic Beverage Control's refusal after the striking of section 24755 to give meaning to the term "authorized importer" set forth in the predecessor of A.B. 499. Simply stated, these persons, including petitioners, began following the decision in *Rice* to purchase in Oklahoma and to import into California brands of liquor which they had not been authorized to import into California under the statutory scheme which pre-dated the *Rice* decision. Norman Williams Company was thus able to acquire branded liquor from Oklahoma, without regard to the vertical allocation of sales territories in California by brand owners, because Oklahoma was one of the two "open wholesaling" states whose law provides that any distiller who chooses to sell distilled spirits in Oklahoma must sell to all licensed Oklahoma wholesalers. (12 Okla. Stat, tit. 37, § 501 *et seq.*) Moreover, Oklahoma law also allows licensed wholesalers to sell distilled spirits *out of* Oklahoma to "qualified persons." (12 Okla. Stat. tit. 37, § 521, subd. (e)) Thus, any distiller who wished to sell in Oklahoma could not enter into an enforceable agreement with its Oklahoma wholesalers whereby the wholesalers would resell only in Oklahoma. As a result, liquor sold for delivery in Oklahoma could be and was redirected or reshipped for sale in California.

By its enactment of A.B. 499, California's legislature intended to nullify the extraordinary extraterritorial impact that Oklahoma law had inadvertently effected in California by virtue of the *Rice* decision and the actions of California's Department of Alcoholic Beverage Control.

As January 1, 1980, the effective date of A.B. 499, approached, Norman Williams Company brought suit in the California courts to enjoin the enforcement of A.B. 499, alleging, among other things, that A.B. 499 conflicted with and was preempted by the Sherman Act. As shown above, despite the fact that A.B. 499 is totally different from the resale price maintenance statute (section 24755) addressed by *Rice*, the court below enjoined the enforcement of A.B. 499.

By enjoining enforcement of A.B. 499, the court below deprived California of the right to regulate liquor within its boundaries by protecting the effectiveness of the agreements between a distiller and its wholesalers which allocate territories for resale in California, a right reserved to the states by the Twenty-first Amendment and recognized by *Midcal*. If California cannot exercise the rights denied to it by the court below, an integral part of its authority under the Twenty-first Amendment will have been taken away. The same loss will ultimately be suffered by the 15 other states and the District of Columbia having primary source statutes. This Court can and should avoid such a result by issuing the requested writ here and by reversing the judgment below.

Moreover, as shown above, this case urgently requires review to resolve the dramatic conflict between the result below and the decision of this Court to dismiss, for want of a substantial federal question, the appeal in *Grant-Billingsley* where a similar primary source law was placed in issue as conflicting with the Sherman Act. Given the result in *Grant-Billingsley*, it would be entirely anomolous to permit the California Court of Appeal's erroneous application of federal law to stand. Yet, without the granting of the instant writ, this result would occur. To dismiss the appeal in *Grant-Billingsley* for lack of a substantial federal question while refusing to

review the contrary holding of the California court in *Norman Williams Co. v. Rice* would leave in doubt and disarray the regulatory systems and a vast number of commercial relationships in the fifteen other states and the District of Columbia which have similar primary source laws.

REASONS FOR GRANTING THE WRIT

1. The Writ Should Issue To Correct An Error Of The California Court Which Denies Citizens Of California A Federal Constitutional Right To Adopt Legislation To Promote Competition Among Different Brands of Liquor Sold In California.

The Twenty-first Amendment provides the states with virtually unfettered discretion to regulate liquor. This Court has made plain that "[c]onsideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited.' " *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 41-42, *reh. denied*, 384 U.S. 967 (1966).

It has thus been the traditional view of this Court that the Twenty-first Amendment reserves in each state the power to prohibit entirely or limit and regulate the traffic in intoxicating liquors within the state. *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, *reh. denied*, 299 U.S. 623 (1936); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, *reh. denied*, 384 U.S. 967 (1966). No one has an inherent right to engage in the sale of intoxicating liquors. *Arizona State Liquor Board of Department of Liquor Licenses & Control v. Ali*, 27 Ariz.App. 16, 550 P.2d 663 (1976); *Tokaji v. State Board of Equalization*, 20 Cal.App.2d 612, 67 P.2d 1082 (1937). It is a privilege granted by the licensing authority and subject to the state's police power. *Giozza v. Tiernan*, 148 U.S. 657 (1893).

These longstanding principles of law have recently been restated by this Court in *Midcal*. In *Midcal*, this Court, while

holding that a state may not require price-fixing conduct of liquor merchants in interstate commerce, left no doubt that "[t]he Twenty-first Amendment grants the states virtually complete control over whether to permit the importation or sale of liquor and how to structure the liquor distribution system." (*Id.* at 110)[4]

California exercises this authority by use of the three-tier scheme of liquor distribution system found in many states. The three tiers referred to are retailing, wholesaling (including importing) and manufacturing (*e.g.*, distilling). Under the scheme, a specific license is required for each such activity, and no one may hold a license to engage in activity at more than one tier. Cal. Bus. & Prof. Code § 23772 (West Supp. 1980).

The primary source law of California, A.B. 499, is, like that of Kansas and other states, a vital ingredient of the three-tier system, particularly in light of the substantial extraterritorial effect of the liquor law of Oklahoma. The Oklahoma law, as discussed, makes it possible for persons who have no California licenses of any kind to sell to California wholesalers liquor that was putatively ordered for shipment to Oklahoma. As a result, without the existence of a primary source law, no distiller can give meaningful assurance to its chosen California wholesalers that they alone will be its franchisees in California. In short, Oklahoma law would and does deny to California the right to have effective vertical allocation of wholesaling territories in liquor.

If California cannot, by its primary source law, restore to a brand owner the right to choose to whom it shall distribute and to enter into territorial allocations with its wholesalers, its rights under the Twenty-first Amendment will be drastically abridged.

The decision in *Midcal* demonstrates that in the absence of active state supervision, liquor laws requiring resale price maintenance which otherwise might violate the antitrust laws

[4] Counsel for *Midcal* asked the Court to change the above-quoted language. (Letter from Jack B. Owens, Esq., to the Honorable Lewis F. Powell, Jr. (March 10, 1980)) Mr. Owens' letter contended that the Court had not intended to reverse broad state powers to structure liquor distribution except where the states themselves engaged in the liquor business. The Court declined to make the suggested change. (Letter from Michael Rodak, Jr., Clerk, to Jack B. Owens, Esq. (March 21, 1980))

cannot continue in effect. Nontheless, it is also clear from *Midcal* and *Grant-Billingsley* that this Court did not intend to emasculate the Twenty-first Amendment where the state's exercise of its police power does not conflict with the Sherman Act and other antitrust laws.

Unlike resale price maintenance laws, primary source laws do not require conduct which might otherwise have violated the Sherman Act. Further, there is nothing in the nature of primary source laws, such as that in California, which shields any supplier, wholesaler or retailer within the three-tier system from accountability for conduct which violates the antitrust laws.

As shown above in *Grant-Billingsley*, the appellants sought to invalidate the Kansas primary source law, which the Kansas Supreme Court had *upheld* as authorized by the Twenty-first Amendment and as consistent with the Sherman Act. This Court dismissed the appeal, stating there was no substantial federal question, even though appellants urged that the holding of the California Court of Appeal in *Norman Williams Co. v. Rice*, to the effect that California's primary source law was preempted by the Sherman Act, required reversal of the Kansas Supreme Court's decision.

It is obvious from the Kansas Supreme Court's decision, when it is read with *Midcal*, that the court below misapplied federal law to California's primary source law. In essence, the holding of the court below announced the very rule which this Court expressly declined to make in *Midcal:* the court below held that even though California's primary source law did not on its face compel a ***per se*** violation of the antitrust laws, it nonetheless was an invalid exercise of the state's power to regulate liquor because of its potentially anti-competitive effects.

However, the court below wrongly concluded that primary source laws are anti-competitive. In this regard, this Court has recently recognized that interbrand competition is often fostered by certain vertically-imposed restraints on intrabrand competition, including the use of vertical allocations of territories. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36

(1977).[5] Similarly, in Kansas, one reason stated by its Supreme Court for unholding Kansas' primary source law was that it fostered interbrand competition. Primary source laws thus play a vital part in enhancing competition at the manufacturing and the wholesaling tiers. By fostering vigorous competition at these tiers, A.B. 499 helps preserve competition at the retail level, all to the ultimate benefit of the consuming public in California. It is an important element in structuring a competitive three-tier distribution system and is unquestionably within the scope of authority guaranteed California by the Twenty-first Amendment, as interpreted in *Midcal.* Accordingly, California's primary source law should be upheld and the judgment below reversed.

Midcal leaves no doubt that the Twenty-first Amendment grants the states virtually complete control over whether to permit the importation or sale of liquor and how to structure the liquor distribution system. Were the court below correct, every state regulation would run afoul of the Twenty-first Amendment. Thus, for example, each state law requiring the licensing of persons distributing liquor within the state would run afoul of the Sherman Act since those failing to obtain licenses could not distribute liquor, thereby preventing the maximum number

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[5] In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), this Court observed that competition between different brands of the same product so substantially protects the interests of consumers that interbrand competition is the "primary concern of the antitrust laws." (*Id.* at 52 n. 19) Such interbrand competition, the Court emphasized, is often fostered by restraints on intrabrand competition, *including the use of vertical allocations of territories.* (*Id.* at 54-56) Without such vertical arrangements, it is difficult, often impossible, for a manufacturer to induce its wholesalers to bear the cost of furnishing special services to its customers because other wholesalers who do not offer the services and bear the costs will nonetheless reap the benefits, *i.e.*, will get a "free ride" on the efforts of others (*Id.* at 55)

Moreover, the Court continued, this vertical allocation of territory is especially important for small businessmen and new entrants for whom expensive, nationwide multi-media campaigns are wholly impractical. (*Id.* at 55-57) If small manufacturers and newcomers cannot offer local wholesalers incentives to promote, they simply cannot compete, and the market will be left to the established manufacturers of high-volume, fast-moving merchandise. Thus, to deny to all manufacturers the opportunity to offer exclusive or limited territories is not only to narrow the field of competition but to restrict the role of the small businessman and the new entrant as well.

of competitors in the marketplace. This is exactly the opposite of the rule announced by this Court in *Midcal,* and it is therefore respectfully submitted that the court below was plainly wrong in ignoring the Twenty-first Amendment.

The Kansas law, the California law and the primary source laws of fourteen other states and the District of Columbia all have the same object—to promote competition among sellers of different brands through vertical allocations of territories. Each state primary source statute derives its authority from the Twenty-first Amendment. If this Court does not grant the writ sought herein and correct the error of the California court, there will undoubtedly be litigation and perhaps conflicting results in the other fourteen states and the District of Columbia. This multiplicity of litigation will make effective and consistent state regulation difficult, introduce enormous uncertainties in business expectations and create widespread doubt as to effect of hundreds of contractual relations between distillers and wholesalers. Equally important, the citizens of the remaining states may well lose their federal constitutional right to benefit from interbrand competition by use of similar primary source laws.

The citizens of each state have the same federal constitutional rights as the citizens of each other state. The Court should not allow the citizens of any state to lose those rights by inaction here. If the Court grants the instant writ and takes action resulting in the reversal of the decision of the California Court of Appeal, the rights of the citizens of each state to implement primary source laws through their respective legislatures will be preserved. On the other hand, if this Court should conclude that California's Court of Appeal ruled correctly and that no state has a constitutional right to a primary source law, then that answer ought to be given once and for all, ending the uncertainty, doubt and litigation which will ensue if no writ issues herein.

2. The Writ Should Issue To Correct The Ruling Below That The Sherman Act Is A Bar To California's Primary Source Law.

As shown above, the California Court of Appeal held that the Sherman Act and A.B. 499 conflicted. The court below essentially employed the following reasoning: (1) The Sherman

Act forbids restrictions on competition; (2) A.B. 499 gives a brand owner power to restrict competition between wholesalers of that brand; (3) therefore, A.B. 499 conflicts with the Sherman Act. *Norman Williams Co. v. Rice,* 108 Cal.App.3d 348, 355-358, 166 Cal.Rptr. 563, 568-570 (1980).

There are two critical flaws in this logic. Most important, even if it be assumed that some vertical allocations of territory made under the authority of A.B. 499 would violate the Sherman Act, nothing in A.B. 499 immunizes any such allocation from full scrutiny and sanction under the Sherman Act. *That is, A.B. 499 does not compel any brand owner and its wholesalers to agree to a restrictive allocation.* As discussed, this Court has made clear that a state law or other action does not immunize voluntary agreements from the Sherman Act. *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 791, *reh. denied,* 423 U.S. 886 (1975). Therefore, whenever a brand owner chooses to allocate territories, that allocation will have to conform to the Sherman Act; if it unreasonably restrains trade, all the Sherman Act's sanctions and remedies will be available to government enforcement authorities and to private parties. In short, A.B. 499 cannot conflict with the Sherman Act because it simply does not require anyone to engage in any conduct which would otherwise violate the Sherman Act.

In addition, and equally important, the Sherman Act does not forbid *unreasonable* restrictions, and the vertical territorial allocation of sales territories is a classic example of a restraint which is forbidden only if unreasonable. *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36 (1977). Yet there was no trial or fact-finding below concerning the reasonableness of the subject vertical allocations of territory. The California court simply ruled that A.B. 499 *on its face* violated the Sherman Act. Thus, as the court had no foundation for its conclusion that every vertical allocation of territory permitted under A.B. 499 for the liquor industry in California would necessarily violate the Sherman Act, this conclusion was unwarranted and unfounded. Even if A.B. 499 *required* vertical allocation of territories, it simply does not follow that, as a matter of law, such allocations would be unreasonable. Before any such determination could be made, a court would have to take

evidence as to the particular allocations that were required in order to determine reasonableness in accordance with the "rule of reason" enunciated in *Board of Trade v. United States,* 246 U.S. 231, 238 (1918), as recently reaffirmed in *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 49 n. 15 (1977).[6]

In sum, A.B. 499 does not require anyone to enter into any territorial allocations, let alone allocations that would violate the Sherman Act. Further, even if allocation arrangements were required, their consistency with the Sherman Act could not have been properly determined by the California Court of Appeal except by trial of the reasonableness issue. Accordingly, the conclusion by the California court that the Sherman Act operates as a bar to A.B. 499 was not only incorrect as a matter of law but also lacked any foundation in fact.

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[6] This analysis assumes, for purposes of argument only, that A.B. 499 was in excess of the authority delegated to California under the Twenty-first Amendment.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment of the Court of Appeal, Third Appellate District, of the State of California.

Respectfully submitted,

FRANK ROTHMAN
CHRISTINA A. SNYDER
WYMAN, BAUTZER, ROTHMAN,
KUCHEL & SILBERT
Two Century Plaza
2049 Century Park East
Los Angeles, California 90067
Attorneys for Petitioner

Of Counsel:
GEORGE MIRON
CAROL S. MENDELSOHN

JULY 17, 1980

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT
Sacramento

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation doing business as GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., A California corporation; FREDERICA AULDRIDGE, doing business as SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE, doing business as TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR., and SHIRLEY D. KIRBY doing business as HOUSE OF FINE SPIRITS,

Petitioners,

v. **3 Civil 19089**

BAXTER RICE, Director, Department of Alcoholic Beverage Control,

Respondent,

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Intervenor,

BOHEMIAN DISTRIBUTING COMPANY,

Intervenor.

ORIGINAL PROCEEDING; application for a writ of mandate. Writ issued.

Feldman, Waldman & Kline, Leland R. Selna, Jr., Max Lieberman, George G. Weickhardt and Thomas W. Martin for Petitioners.

Harry M. Snyder and Luana L. Martilla as Amici Curiae on behalf of Petitioners.

George Deukmejian, Attorney General, and George J. Roth, Deputy Attorney General for Respondent.

Pillsbury, Madison & Sutro, Noble K. Gregory, Parker A. Maddux, Gary W. Jackson, Heller, Ehrman, White & McAuliffe, Stephen V. Bomse, White & Case, Macdonald Flinn, Edna R. Sussman, Douglas W. Metz, Abraham Tunick, Richman & Garrett, Lionel Richman, Ivan J. Potts, Michael J. Shelley, and James M. H. Ball as Amici Curiae on behalf of Respondent.

Ball, Hunt, Hart, Brown and Baerwritz, Joseph A. Ball, Anthony Murray, Michael J. Maloney, James Polish, William T. Chidlaw, Wyman, Bautzer, Rothman, Kuchel & Silbert, Frank Rothman and Christina A. Snyder (Los Angeles, California), Wyman, Bautzer, Rothman, Kuchel & Silbert and George Miron (Washington D.C.) for Intervenors.

In this proceeding in writ of mandate we are called upon to determine the validity of that portion of Business and Professions Code section 23672 (as amended by Assem. Bill No. 499, Stats. 1979, ch. 280, § 1; hereinafter "designation statute"), which provides that a licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless designated as an authorized importer of such brand by the brand owner or its authorized representative.

We conclude for reasons which we explain, that the designation statute is invalid. Accordingly, we issue the writ.[1]

* * * * *

This dispute arises out of the determination by the appellate courts of this state that California's alcoholic beverage price maintenance laws are invalid. Prior to 1978 the Business and

[1] The intervenors have moved to strike the documents filed as exhibits in support of the petition. We do not rely upon those documents in reaching our decision herein, and the motion is therefore denied as moot.

Professions Code contained price maintenance provisions concerning all aspects of the alcoholic beverage industry. In Rice v. Alcoholic Bev. etc. Appeals Bd. (1978) 21 Cal.3d 431, the California Supreme Court unanimously determined that the price maintenance provisions relating to the retail sale of distilled spirits were in violation of the Sherman Act (15 U.S.C. § 1 et seq.), and that no legitimate state interest outweighed the policies of the Sherman Act. (*Id.*, at p. 459.) The Court declared the price maintenance provisions relating to retail sales of distilled spirits invalid. (*Ibid.*)

In Capiscean Corp. v. Alcoholic Bev. Etc. Appeals Bd. (1979) 87 Cal.App.3d 996, the First District Court of Appeal considered the validity of the price maintenance provisions relating to the retail sale of wine. The court found the decision in *Rice,* supra, controlling and declared those provisions to be invalid. The alcoholic beverage price maintenance laws reached this court in Midcal Aluminum, Inc. v. Rice (1979) 90 Cal.App.3d 979. We considered the validity of the price maintenance laws relating to the wholesale and retail sale of wine and concluded that those laws were invalid under the decision in *Rice,* supra.

An intervenor in Midcal Aluminum, Inc. v. Rice, supra, the California Retail Liquor Dealers Association, petitioned the California Supreme Court for a hearing but that Court declined to hear the case. The dealers association then sought certiorari from the United States Supreme Court, which was granted. (___ U.S. ___ [62 L.Ed. 2d 31].) On March 3, 1980, the United States Supreme Court issued its decision in California Liquor Dealers v. Midcal Aluminum (1980) ___ U.S. ___ [63 L.Ed. 2d 233].) The Court unanimously (Brennan, J. not participating) affirmed this court's decision, and approved the California Supreme Court's opinion in *Rice*, supra. California's alcoholic beverage price maintenance laws are thus no longer enforced.

Prior to the judicial decisions striking down the alcoholic beverage price maintenance provisions of the Business and Professions Code, section 23672 of that code provided: "A licensed importer shall not purchase or accept delivery of any

brand of distilled spirits unless he is designated as the authorized importer of such brand by the licensee who filed the minimum retail price schedule for such brand pursuant to Section 24755. Such distilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee." When the price maintenance provisions were declared invalid, the Department of Alcoholic Beverage Control took the position that section 23672 became unenforceable because there were no longer any minimum retail price schedules required to be filed.

Among the petitioners are licensed importers and wholesalers of distilled spirits as well as licensed retailers of distilled spirits. After the price maintenance provisions of the Business and Professions Code were declared invalid the importer petitioners secured sources of supply of national brand distilled spirits in Oklahoma, referred to as the "Oklahoma connection." Under Oklahoma law a distiller who chooses to sell distilled spirits in Oklahoma must sell to all licensed Oklahoma wholesalers and may not discriminate either as to price or as to quantity: (12 O.S. 1961, tit. 37, §§ 501 et seq.) The distiller is required to sell distilled spirits at a rate which is no higher than the lowest rate at which the seller sells in any other state. *(Id.*,§ 536.1, subd. (a).) The licensed wholesalers may sell to any licensed retailer or wholesaler within Oklahoma, and may sell distilled spirits out of Oklahoma to "qualified persons." *(Id.*, § 521, subd. (e).) The importer petitioners have been able to purchase national brand distilled spirits in Oklahoma, import such distilled spirits to California, and sell these products to licensed retailers at prices below the suggested wholesale prices which the distillers provide to their designated wholesalers.

The amendment of Business and Professions Code section 23672 provided for by Assembly Bill 499 amends the language of that section to read: "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Such distilled spirits

imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee." (Stat. 1979, ch. 280, § 1.) This provision would effectively preclude the importer petitioners from competing for the wholesale market of certain national brands, because they have been denied designation as authorized importers by the brand owners. The petitioners thus will be unable to secure these brands from the distillers and are precluded from purchasing such brands from Oklahoma sellers.

The importer petitioners seek a peremptory writ of mandate or alternatively prohibition ordering the Department of Alcoholic Beverage Control not to enforce section 23672 so that they may continue to compete in the wholesale distilled spirit market with national brands obtained from Oklahoma sellers. The retailer petitioners seek such a writ so that they may continue to purchase national brand distilled spirits at prices below the distillers' suggested wholesale prices. We issued an alternative writ of mandate and stayed enforcement of the statute pending the return to the writ and further order of this court.

The basis of the judicially declared invalidity of the California alcoholic beverage price maintenance provisions was the Sherman Antitrust Act, 15 United States Code, sections 1 et seq. (Rice v. Alcoholic Bev. etc. Appeals Bd., supra, 21 Cal.3d at p. 459; Midcal Aluminum, Inc. v. Rice, supra, 90 Cal. App.3d at p. 984; Capiscean v. Alcoholic Bev. Etc. Appeals Bd., supra 87 Cal. App. 3d at pp. 999-1000.) In view of the United States Supreme Court's approval of the California appellate opinions, it is clear that the Sherman Act applies to interstate commerce in alcoholic beverages. (California Liquor Dealers v. Midcal Aluminum, Inc., supra, ____ U.S. ____ [63 L.Ed.2d at p. 245].) We thus consider whether Business and Professions Code section 23672, as amended, is in violation of the Sherman Act.[2]

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[2] The argument is made that this court does not have jurisdiction to consider the contentions raised relating to the Sherman Act, since suits arising under that Act must be brought in federal court. We reject this contention.

(footnote continues)

The California Supreme Court's opinion in *Rice* is instructive on the course of the inquiry we must make. We must first consider whether the scheme, in the absence of governmental sanction, would violate the Sherman Act. If the scheme would violate the Sherman Act in the absence of governmental sanction, we must then consider whether governmental sanction for the scheme validates the scheme despite the Sherman Act. That inquiry is two-fold. It must be determined whether the marketing scheme is within the state action exception to the Sherman Act as stated in Parker v. Brown (1942) 317 U.S. 341 [87 L.Ed. 315], or whether the Twenty-First Amendment to the United States Constitution reserves to the state the power to authorize such a scheme. (Rice, supra, 21 Cal.3d at pp. 439-447.)

The Sherman Act

The purpose of the Sherman Act ". . . is to prevent or suppress devices or practices which create monopolies or restrain trade or commerce by suppressing or restricting competition and obstructing the course of trade." (54 Am.Jur.2d, Monopolies, Etc., § 1, p. 668; fns. omitted.) "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise

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(footnote continued)

Petitioners are not seeking a private remedy against private parties in this action. They are suing to enjoin enforcement of a state statute which is alleged to be invalid under the Sherman Act. We may consider whether the statute is valid in a proceeding for writ of mandate. (See Midcal Aluminum, Inc. v. Rice, supra, 90 Cal.App.3d 984; Alpha Beta Mkts. v. Amal. Meat Cutters (1956) 147 Cal.App.2d 343, 351.)

open to question, the policy unequivocally laid down by the Act is competition." (Northern P. R. Co. v. United States (1958) 356 U.S. 1, 4 [2 L.Ed.2d 545, 549].)

The judicial opinions interpreting the Sherman Act have provided a judicial gloss to its meaning. Although the Act is literally all-encompassing, the courts have construed it as precluding only actions which "unreasonably" restrain competition. (*Id.*, 356 U.S. at p. 5 [2 L.Ed. 2d at p. 549].) There are, however, certain practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable. (*Ibid.*) This is the doctrine of per se illegality. All actions which are not per se unreasonable are subject to the "rule of reason." (Continental T.V. Inc. v. GTE Sylvania Inc. (1977) 433 U.S. 36, 49-50 [53 L.Ed.2d 568, 580].) Under the rule of reason the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. (*Ibid.*)

Among the types of conduct which have been declared per se illegal are tying arrangements, agreements among competitors to divide markets or allocate customers, group boycotts, agreements to limit production, and price fixing. (54 Am.Jur.2d, Monopolies, Etc., supra, § 32, p. 687.) Price fixing, without more, is illegal because it eliminates one form of competition. (United States v. Univis Lens Co. (1941) 316 U.S. 241, 252 [86 L.Ed. 1408, 1419]; United States v. Trenton Potteries Co. (1927) 273 U.S. 392, 397 (71 L.Ed. 700, 706; 50 A.L.R. 989].) Group boycotts are per se illegal because they "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment," thus restraining competition. (Kiefer-Stewart Co. v. Seagram & Sons (1951) 340 U.S. 211, 213 [95 L.Ed. 219, 223]. See also Klor's v. Broadway-Hale Stores (1959) 359 U.S. 207, 212 [3 L.Ed.2d 741, 745].) Tying arrangements, whereby a seller agrees to sell one product but only on the condition that the buyer purchase a different product as well, curb competition with respect to the tied product and are thus illegal per se. (See Northern P. R. Co. v. United States, supra, 356 U.S. at pp. 5-6 [2 L.Ed.2d at p. 550].) In fact, all per se violations are

declared to be so because by their nature they are manifestly anticompetitive. (See Continental T.V. Inc. v. GTE Sylvania Inc., supra, 433 U.S. at pp. 49-50 [53 L.Ed.2d at p. 580].)

Petitioners attempt to analogize Business and Professions Code section 23672 to certain per se violations of the Sherman Act in order to demonstrate its invalidity. The opposition to the petition argue that the statute does not clearly come within a declared per se violation and must be upheld in this proceeding. It is difficult to analyze the designation statute in terms of common violations of the Sherman Act because of the unique nature of the statute. The designation statute gives brand owners the unfettered power to restrain competition, not by relying upon any artifice such as tying arrangements or group boycotts, but by merely deciding who may and who may not compete. In effect, that statute gives one private party the unlimited power to tell an independent licensed California buyer that he may not buy from an independent licensed Oklahoma seller. A more clear power to restrain interstate trade is difficult to imagine.

It is suggested in opposition to the petition that brand owners have the inherent power to designate importers to whom they will sell and that the designation statute merely recognizes this power. We emphatically reject this construction of the statute. The statute goes much further than to merely allow a manufacturer to determine to whom it will sell; it allows the manufacturer to forbid others to sell to a disfavored importer. We are not concerned with any contractual channel of distribution a brand owner might create or use; we are concerned with the state-provided authority to prevent trade among others. In this respect it is irrelevant that the statute gives brand owners the power to restrain intrabrand competition rather than interbrand competition. (See United States v. Topco Associates (1971) 405 U.S. 596, 610-611 [31 L.Ed.2d 515, 527].)

The opposition to the petition cite Continental T.V. Inc. v. GTE Sylvania, Inc., supra, 433 U.S. 36 [53 L.Ed.2d 568], in support of the contention that the power provided to brand owners by the designation statute does not violate the Sherman

Act. In that case Sylvania sold televisions through a franchise plan. Sylvania limited the number of franchises for any given area and required each franchisee to sell only from the location or locations at which he was franchised. A franchise did not constitute an exclusive territory and Sylvania retained the discretion to increase the number of retailers in an area. Continental was a successful San Francisco franchisee that sought and was refused permission to open a franchise in Sacramento. On certiorari the United States Supreme Court considered whether the franchise plan was a per se violation of the Sherman Act and concluded that it was not. A vertical restriction of territory, unlike a horizontal restriction, must be judged under the rule of reason. (*Id.*, 433 U.S. at p. 59 [53 L.Ed.2d at p. 585].)

We find the decision in *Continental T.V. Inc.* v. *GTE Sylvania Inc.* to be inapposite to the statutory provision which we consider. That case involved a manufacturer's chosen method of product distribution enforced by a refusal to sell to retailers outside of their assigned territories. Petitioners herein do not attack the decision of distillers to refuse to trade with them; rather, they attack the state provided authority of the distillers to prohibit them from trading with others. Nothing in *Continental T.V. Inc.* v. *GTE Sylvania Inc.* authorizes a state to delegate such power to a private party.

Article I, section 8, subdivision (3) of the United States Constitution gives to the federal government the exclusive power to regulate interstate commerce. Pursuant to that power Congress passed the Sherman Act, with its unequivocal policy of encouraging competition. (Northern P. R. Co. v. United States, supra, 356 U.S. at p. 4 [2 L.Ed.2d at p. 549].) Business and Professions Code section 23672 gives private parties the unqualified power to prevent interstate commerce between other private parties, and used the coercive power of the state to enforce such power. That section does not merely authorize a private party to engage in practices which may restrain interstate trade; rather, it gives private parties the unfettered power to forbid interstate trade between other private parties. Such a grant of authority is in direct contravention of the express terms of the Commerce Clause and the Sherman Act. We conclude

that Business and Professions Code section 23672 is invalid unless the state action exception to the Sherman Act or the Twenty-First Amendment to the United States Constitution authorizes such a delegation of authority.

The State Action Exception

There can be no doubt that the designation statute involved herein is not within the state action exception to the Sherman Act. In California Liquor Dealers v. Midcal Aluminum, Inc., supra, ____ U.S. ____ [63 L.Ed.2d 233], the Supreme Court noted two standards for antitrust immunity. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; and second, the policy must be actively supervised by the state itself. (*Id.*, ____ U.S. ____ p. ____ L.Ed.2d at p. 243].) The Court found California's alcoholic beverage price maintenance laws to be without the state action exception because "The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement." (*Ibid.*; fn. omitted.)

The designation statute involved is likewise devoid of state involvement. The state has specified no standard to be applied by the private parties in reaching their decisions to forbid competition, does not oversee the choices made, and does not otherwise participate. The state, for its part, has licensed the importer petitioners to engage in the importation of alcoholic beverages, but then provided other private parties with the unfettered power to restrain them from engaging in the trade for which the are licensed. Business and Professions Code section 23672 is clearly not within the state action exception to the Sherman Act.

The Twenty-First Amendment

In California Liquor Dealers v. Midcal Aluminum, supra, the Supreme Court held "... that there is no bright line between federal and state powers over liquor. The Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." (*Id.*, ____ U.S. ____ at p. ____ [63 L.Ed.2d at p. 246].) The Court considered California's interest in its price maintenance laws and found that "[t]he unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act." (*Id.*, — U.S. ____ at p. ____ [63 L.Ed.2d at p. 248].)

We reject the contention of those opposed to the petition for a writ of mandate that the designation statute is within the state's virtual complete control over whether to permit importation or sale of liquor and how to structure the distribution system. California has determined to permit the importation of liquor into the state by private parties and has established a distribution system of which the petitioners are a licensed part. In division 9 of the Business and Professions Code the state has provided detailed requirements for those who desire to engage in the distribution of alcoholic beverages and the petitioners have complied with those requirements and obtained state approval to participate in the distribution of liquor. The designation statute does not relate to the decision whether to permit the importation and sale of liquor and is not a part of the establishment of the channels of distribution. The designation statute, like the price maintenance laws, is precisely the type of regulation which must be reconciled with the federal interests in interstate commerce.

In the balancing process we are required to determine what policies are furthered by the state statute, whether that statute clearly vindicates those policies, and whether and to what

degree the policy underlying the Sherman Act is undermined by that statute. (Rice v. Alcoholic Bev. etc. Appeals Bd., supra, 21 Cal.3d at p. 451.) In California Liquor Dealers v. Midcal Aluminum, supra, the United States Supreme Court noted that the federal interest in enforcing the national policy in favor of competition is both familiar and substantial, citing a prior decision in which it was stated: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." (California Liquor Dealers v. Midcal Aluminum, supra, ___ U.S. ___ at p. ___ [63 L.Ed.2d at p. 246]; citing United States v. Topco Associates, supra, 405 U.S. at p. 610 [31 L.Ed.2d at p. 527].) The grant of power to a private party to prohibit interstate commerce between other private parties and to limit competition in the California wholesale market results in a complete undermining of the federal policies embodied in the Sherman Act. We must consider whether there is a sufficient state interest to outweigh this result.

Those opposed to the petition for a writ of mandate have suggested several state interests purportedly served by the designation statute. We are told that the statute will facilitate the monitoring and tracing of imported distilled spirits and aid in the collection of excise taxes, assist in the maintenance of the three-tier system of distribution,[3] preserve the competitive viability of small retailers, prevent predatory business practices, protect the brand owners' rights to their goodwill,[4] promote stable labor relations, and promote temperance.

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[3] The designation statute is actually directly contrary to the public policy behind the three-tier distribution system. The three-tier system was established to maintain the independence of the various levels of the liquor industry and to prevent the integration of manufacturing, wholesale and retail functions. (Harris v. Alcoholic Bev. Etc. Appeals Bd. (1964) 61 Cal.2d 305, 309.) The designation statute reimposes the dependency of wholesalers upon brand owners which the three-tier system was designed to prevent.

[4] It is difficult to understand how the brand owners believe that their "right to their goodwill" could justify the type of unlimited power to restrain competition authorized by the designation statute. Federal copyright, patent

(footnote continues)

We do not perceive that the designation statute will clearly vindicate these interests. The California liquor industry is heavily regulated and there are numerous provisions designed to insure that each legitimate state interest is fully realized. The broad grant of anti-competitive power to private parties will certainly vindicate private concerns, but would appear to be relatively insignificant in vindicating state interests. In this respect it must be noted that the designation statute is drastically overbroad. It provides no standards which brand owners are to apply in reaching their decisions. Brand owners are given the unqualified power to restrain interstate trade without regard to whether the exercise of that power actually furthers a state interest and despite the fact that their decisions might actually impede state interests. Further, the decisions of the brand owners are final, there is no review by the state agency charged with enforcing those decisions to ensure that state interests are in fact furthered. As noted by the United States Supreme Court concerning decision making which affects competition: "Private forces are too keenly aware of their own interests in making such decisions . . . ." (United States v. Topco Associates, supra, 405 U.S. at p. 611 [31 L.Ed.2d at p. 528].)

Another important factor in the balancing process we must undertake is whether there are other means by which the state interest may be served without running afoul of the Sherman Act. (Rice v. Alcoholic Bev. etc. Appeals Bd., supra, 21 Cal.3d at p. 458.) There are clear alternatives to the designation statute which will further state interests. The importation and sale of liquor is subject to heavy regulation by the state. Licensing restrictions and reporting requirements, as well as regulations to control and prevent unfair trade practices, are available to vindicate state interests. Each legitimate state

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(footnote continued)

and trade mark laws are designed to protect such rights and those laws preclude the control over the distribution system granted by the designation statute. A seller of goods may attempt to contractually limit resale or refuse to sell to those who resell in violation of its policies, but the Sherman Act renders such action illegal if it unreasonably restrains trade. The type of control over competition granted by the designation statute is simply antithetical to a free enterprise economy.

interest in the importation and sale of liquor may be properly served without resort to a statute in direct contravention to the policies of the Sherman Act.

The most important alternative means of promoting the asserted state interests is exemplified by the regulatory programs upheld against attack under the Sherman Act in Parker v. Brown, supra, 317 U.S. 341 [87 L.Ed. 315]; and New Motor Vehicle Bd. v. Orrin W. Fox Co. (1978) 439 U.S. 96 [58 L.Ed.2d 361]. In each of those cases California furthered its interests by authorizing private action which would violate the Sherman Act if undertaken by private parties without governmental sanction. In each of those cases the regulatory programs were upheld by the United States Supreme Court because California did not merely authorize a violation of the Sherman Act, it involved itself in the decision-making process. In each case a state agency maintained control and subjected the private party decisions to pointed reexamination to insure that the policies of the Sherman Act were not unnecessarily subordinated to state policy. (See Rice v. Alcoholic Bev. etc. Appeals Bd., supra, 21 Cal.3d at pp. 441-445.)

Under the California Constitution, the Department of Alcoholic Beverage Control is given the exclusive power to license the importation and distribution of liquor in California. (Cal. Const., art. XX, § 22.) The Alcoholic Beverage Control Appeals Board is established to review decisions of the department. (*Ibid.*) Despite the ready availability of these regulatory agencies to control and review decisions of private parties in regards to the importation of liquor, the designation statute confers absolute and unqualified power upon private parties to restrain interstate commerce in distilled spirits. That power may be exercised by the private parties without regard to the potentially devastating effects it may have upon federal interests and without regard to whether it actually serves state interests.

We find that the substantial federal policies of the Sherman Act are violated by the liquor designation statute and, in light of clear alternatives to that statute, the state interests

sought to be achieved are not sufficient to outweigh those policies. We conclude that Business and Professions Code section 23672, as amended by Assembly Bill number 499 (Stats. 1979, ch. 280, § 1), is invalid to the extent it authorizes private action in restraint of trade.

In view of our decision it is not necessary to consider petitioners' remaining contentions and we indicate no view as to how we would resolve those issues. Further, we are not concerned with that portion of Business and Professions Code section 23672 which requires that imported distilled spirits come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer before sale to a retailer, and our decision shall not preclude enforcement of that requirement.

Let a peremptory writ of mandate issue ordering respondent to refrain from enforcing that portion of Business and Professions Code section 23672 which provides: "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent." (CERTIFIED FOR PUBLICATION.)

REYNOSO, J.

We concur:

PUGLIA, P.J.

EVANS, J.

APPENDIX B

ORDER OF SUPREME COURT OF THE STATE OF CALIFORNIA

Order Due
October 15, 1980

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
3rd District, Division --, Civil No. 19089

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA
IN BANK

NORMAN WILLIAMS COMPANY ET AL., Petitioners

v.

BAXTER RICE, AS DIRECTOR, ETC., Respondent;

WINE AND SPIRITS WHOLESALERS OF CALIFORNIA
ET AL. Intervenors

Petitions of Intervenors & Resp. for hearing DENIED.

Manuel, J., is of the opinion that the petitions should be granted.

BIRD
Chief Justice

SUPREME COURT
FILED
SEP 24 1980
LAURENCE P. GILL, Clerk

Deputy

APPENDIX C

The Constitution of the United States, Amendment XXI, Section 2:

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

APPENDIX D

The following are pertinent provisions of the Sherman Act, 15 U.S.C. § 1 *et seq.* (1975):

§ 1. Trusts, etc., in restraint of trade illegal; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX E

The following are pertinent provisions of the California Business and Professions Code:

§ 24755 (repealed 1978). Retail sale of distilled spirits.

(a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may be filed separately and differently for the trading area of southern California and the trading area of northern California. The trading area of southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The northern California trading area shall consist of the other counties of the state. No more than one person shall file a schedule for the same package for the same trading area.

(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the State; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this State; (3) a manufacturer or rectifier licensed in this State and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amendments, change, or modification with the department on or before the

15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed selling price at retail within one dollar ($1) per gallon of the brand for which a competitive price is filed.

The department shall reject any price schedule which does not comply with this subdivision.

(e) A price schedule or amendment, change or modification thereof as provided for by this section shall be deemed filed when received, either by personal delivery or mail, at the headquarters office of the department in Sacramento. Upon such filing, a price schedule or amendment, change or modification thereof shall become a public record. Such filing of a price schedule or amendment, change or modification thereof shall constitute constructive notice of its contents to any licensee affected thereby.

(f) No off-sale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.

(g) No retail licensee shall sell any package of distilled spirits as a loss leader. "Loss leader," as used in this section, means a sale below cost as such cost is defined in Sections 17026 to 17029, inclusive, of this code, except that a sale below cost made under the provisions of Section 17050 of this code shall not be deemed a loss leader sale.

(h) The provisions of this section shall not apply to:

(1) A closeout sale made in good faith and approved by the department when the following conditions exist: (i) the stock of distilled spirits sought to be closed out has

been in this State, either in the possession of the vendor who sold it to the retailer or in the possession of the retailer who seeks to close out the brand, for a period of not less than six months; (ii) the stock of distilled spirits to be closed out was not brought into this State for the purpose of offering it, or any part of it, at a closeout sale; (iii) at least 10 days prior to filing a request with the department for approval to sell the stock at a closeout sale, the retailer had offered to return the distilled spirits, at his original invoice cost, to both the vendors from whom he purchased them or to his successor and to the licensee who filed the minimum price schedule under the provisions of this section; (iv) such offer of return was not accepted.

At the place of any closeout sale and upon any package of distilled spirits to be so sold and in any advertisement in connection therewith, public notice shall be given of the sale as a closeout sale. Following the conclusion of a closeout sale, the retailer who conducted such sale shall not sell the same brands of distilled spirits for a period of at least one year.

(2) Sales made with the approval of the department when the distilled spirits or the package is damaged or deteriorated in quality and notice of this fact is given to the public at the place of any such sale and upon the package offered for sale and in any advertisement in connection therewith.

(3) Sales made by any officer acting under the orders of any court.

(4) Sales of distilled spirts for use in the manufacture or production of food products which are unfit for beverage use as provided in Section 23112, if such distilled spirits are sold to a person who holds a permit and identification number authorizing the filing of a claim for drawback of federal distilled spirits excise taxes under the Federal Non-Beverage Drawback Regulations.

(i) A minimum retail price schedule containing a minimum retail price for each package of any brand of beer may be filed under the provisions of this chapter by the person in control of such brand and when so filed, the provisions of this chapter and any rules adopted by the department for the administration of the provisions of this chapter shall apply to the sale of packages of such brand of beer.

(j) The department shall adopt rules whereunder minimum retail prices of distilled spirits will be made available to licensees; means of making such prices available may include, but need not be limited to, publication in trade journals or industry price books of general circulation among retail licensees in this state, or in parts or trading areas of this state.

§ 23672 (1973). Designation of licensed importer as authorized importer who filed minimum retail price schedule.

A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as the authorized importer of such brand by the licensee who filed the minimum retail price schedule for such brand pursuant to Section 24755. Such distilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and deliver to a retail licensee.

§ 23672 ("A.B. 499"), as amended by Stats. 1979 ch. 280 § 1. Designation of licensed importer as authorized importer of brand.

A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Such distilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee.

§ 23772. Distilled spirits manufacturer's or manufacturer's agent's license: Exceptions.

No distilled spirits manufacturer's or distilled spirits manufacturer's agent's license shall be held by any person who holds any ownership or interest, directly or indirectly, by stock ownership, interlocking directors, trusteeship, loan, mortgage, or lien on any personal or real property, or otherwise, in any distilled spirits wholesaler's rectifer's, or retailer's license.

The provisions of this section shall not apply to the financial or representative relationship between a manufacturer, wine grower, manufacturer's agent, rectifier, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of such person, and a person holding only one of the following types of licenses:

(a) On-sale general license for a bona fide club.

(b) Club license (issued under Article 4 (commencing at Section 23425) of Chapter 3 of this division).

(c) Veterans' club license (issued under Article 5 (commencing at Section 23450) of Chapter 3 of this division).

(d) On-sale license for boats, trains, sleeping cars or airplanes where the alcoholic beverages produced or sold by such manufacturer, wine grower, manufacturer's agent, rectifier, bottler, importer, or wholesaler or any officer, director, or agent of such person are not sold, furnished or given, directly or indirectly to the on-sale licensee.

APPENDIX F

The following are pertinent provisions of the Oklahoma Alcoholic Beverage Control Act, 12 Okla. Stat. tit. 37, § 501 *et seq.* (1978):

§ 521, subd. (e). Acts authorized by the various licenses.

A wholesaler's license shall authorize the holder thereof: to purchase and import into this state spirits and wines from persons authorized to sell same who are the holders of a nonresident seller's license, and their agents who are the holders of manufacturer's agent's licenses; to purchase spirits and wines from licensed distillers, rectifiers, winemakers and wholesalers in this state; to sell spirits and wines in retail containers in this state to retailers; to sell spirits and wines to wholesalers authorized to sell same; and to sell spirits and wines out of this state to qualified persons. Wholesalers shall be authorized to place such signs outside their place of business as are required by Acts of Congress and by such laws and regulations promulgated under such Acts.

A wholesaler's license shall authorize the holder thereof to operate a single bonded warehouse with a single central office together with delivery facilities at a location in this state only at the principal place of business for which the wholesaler's license was granted.

§ 533. Sales to wholesaler without discrimination or inducement.

Any manufacturer or subsidiary of a manufacturer who markets his or its products solely through a subsidiary or subsidiaries, a distiller, rectifier, bottler, winemaker, brewer, or importer of alcoholic beverages bottled or made in a foreign country, either within or without this State shall be required to sell such brands or kinds of alcoholic beverages to every licensed wholesaler or Class B wholesaler who desires to purchase the same, on the same price basis and without discrimination or inducements, and shall further be required to

sell such beverages only to those persons licensed as wholesalers or Class B wholesalers.

No manufacturer shall require a wholesaler or Class B wholesaler to purchase any alcoholic beverages or any goods, wares or merchandise as a condition to the wholesaler or Class B wholesaler obtaining or being entitled to purchase any alcoholic beverages.

Violation of this Section shall be a misdemeanor. Conviction hereunder shall automatically revoke the violator's license.

§ 536.1. Limitation on price of distillers' sales.

No distiller shall sell alcoholic beverages to a wholesaler licensed under the Alcoholic Beverage Control Act at a rate higher than the lowest rate at which such distiller sells in any other state.

APPENDIX G

The following are provisions of the Kansas Statutes (Kan. Stat. § 41-101 *et seq.*), as added or as amended by House Bill 2020 (the "Kansas Legislation"):

§ 41-407. Evasion of liquor tax acts forbidden; penalty.

(a) It shall be unlawful for any person to:

(1) Evade, or attempt to evade, the payment of tax or duty on any alcoholic liquor, in any manner whatever. Upon conviction of violation of this subsection, in addition to the penalty prescribed for the violation of this act, the violator shall forfeit and pay, as a part of costs in the action, double the amount of the tax or duty so evaded or attempted to be evaded.

(2) Have in his or her possession any cask or package of alcoholic liquor, without having thereon each mark and stamp required therefor by law, and any such cask or package not having thereon each such mark or stamp shall be forfeited to the state of Kansas.

(3) Affix or cause to be affixed to or upon any cask or package containing or intended to contain alcoholic liquor, any stamp, photographed label, device or token, regardless of the purpose thereof, which resembles or has the general appearance of any tax or revenue stamp required by the laws of the state of Kansas or by rules and regulations of the director to be affixed to or upon any cask or package containing such liquor.

(b) Nothing contained in this section shall make unlawful the possession and transportation of wine imported solely for use by a church or religious organization for sacramental purposes and uses.

(c) Violation of any provision of this section is a misdemeanor punishable by a fine not exceeding five hundred dollars ($500) or imprisonment not exceeding six (6) months, or both, and in proper cases the trial court may order and direct

the confiscation of the liquor involved in the violation as part of the judgment of conviction.

§ 41-306. Alcoholic liquor distributor's license (except beer) rights of licensee.

(1) No distributor of alcoholic liquor, except beer, shall sell any alcoholic liquor in this state unless such distributor has filed with the director a written notice stating each geographic territory, agreed upon in writing between the distributor and a supplier of the distributor, within which the distributor sells to retailers one or more brands of such supplier. Such notice shall be accompanied by a map outlining each geographic territory stated in the notice. No manufacturer, importer or other supplier shall grant a franchise for the distribution of a brand to more than one distributor for all or part of any designated territory.

(2) Each supplier of alcoholic liquors doing business within this state shall file with the director a written notice describing each geographic territory, agreed upon in writing between the supplier and a distributor, within which the distributor sells to licensed retailers one or more brands of the supplier.

(3) No supplier or distributor shall terminate or modify a franchise for the distribution of a brand of alcoholic liquor or alter the geographic territory designated in a franchise agreement unless such supplier or distributor files written notice thereof with the director not less than thirty (30) days prior to the termination, modification or alteration. In the case of an alteration [in] a franchise territory, such notice shall be accompanied by a map outlining the altered territory. Upon receipt of such notice, the director shall notify immediately, by certified mail, all affected parties of the impending termination, modification or alteration.

(4) Any notice filed by a supplier pursuant to subsection (3) shall be accompanied by an affidavit stating that the termination, modification or alteration is not caused by the failure of the distributor to violate any provision of the Kansas

liquor control act or any rules and regulations adopted pursuant thereto.

(5) Any supplier or distributor aggrieved by a termination, modification or alteration made under subsection (3) may file an appropriate action in any district court of this state having venue, alleging that the termination, modification or alteration violates the franchise agreement between the supplier and distributor involved.

(6) No franchise agreement for the distribution of a brand of alcoholic liquor shall be terminated or modified, nor shall the territory designated in such an agreement be altered, except for reasonable cause.

(7) This section shall be part of and supplemental to the Kansas liquor control act.

§ 41-410. Liquor (except beer); exclusive territorial franchise; filing of notice by distributors and suppliers; termination or modification of franchise.

An alcoholic liquor distributor's license, except a beer distributor's license, shall allow: (1) The wholesale purchase, importation and storage of alcoholic liquors, except beer, but all such alcoholic liquor so purchased or imported which is manufactured in the United States shall be purchased from the primary American source of supply or from another licensed distributor, except that a licensed distributor may purchase confiscated alcoholic liquor at a sheriff's sale;

(2) The sale of alcoholic liquors, except beer, to:

(a) Distributors licensed in this state,

(b) Retailers licensed in this state, except that a licensed distributor shall sell a brand of alcoholic liquor only to those retailers whose licensed premises are located in the geographic territory within which such distributor is authorized to sell such brand, as designated in the notice or notices filed with the director pursuant to K.S.A. 1979 Supp. 41-410, and

(c) Such persons located outside such territory or outside this state as permitted by law;

(3) The purchase of alcoholic liquors, except beer, in barrels, casks or other bulk containers and the bottling thereof before resale, but all bottles or containers filled with such alcoholic liquors shall be sealed, labeled, stamped and otherwise made to comply with all laws and rules and regulations governing the preparation and bottling of alcoholic liquors by manufacturers and with all federal rules, regulations and laws.

§ 41-701. Certain sales by distributors, wholesalers and manufacturers prohibited; criminal penalties; civil liability.

(1) No distributor or wholesaler shall sell or attempt to sell any alcoholic liquor within this state except to:

(a) A licensed manufacturer, licensed nonbeverage user or licensed distributor; or

(b) A licensed retailer, except that, subject to the provisions of subsection (2):

(i) No distributor of alcoholic liquor, except beer, shall sell a brand of alcoholic liquor to any retailer whose licensed premises are located outside of the geographic territory within which such distributor is authorized to sell such brand, as designated in the notice filed with the director pursuant to K.S.A. 1979 Supp. 41-410; and

(ii) No beer distributor shall sell beer to any retailer who is located outside the geographic territory designated in the notice filed with the director by the distributor pursuant to K.S.A. 1979 Supp. 41-409.

(2) (a) If any beer distributor refuses to sell beer or provide service in connection therewith to any retailer located within such beer distributor's geographic territory, it shall be lawful for any other beer distributor to sell beer to such retailer.

(b) If any licensed distributor of alcoholic liquor, except beer, refuses to sell alcoholic liquor which such distributor is authorized to sell or refuses to provide any service in connection therewith to any retailer located within such distributor's geographic territory, it shall be lawful for any other licensed distributor of alcoholic liquor, except beer, to sell such liquor to such retailer.

(3) No manufacturer of alcoholic liquor shall sell or attempt to sell any alcoholic liquor within this state except to a licensed manufacturer, licensed distributor or licensed nonbeverage user, except that the holder of a license to manufacture beer may attempt to sell or sell beer manufactured by such manufacturer to retailers licensed in this state, but a licensed manufacturer of beer shall not sell or attempt to sell any beer manufactured by such manufacturer containing not to exceed three and two-tenths percent (3.2%) of alcohol by weight to any person in this state other than a wholesaler or distributor licensed as such under the laws of this state relating to cereal malt beverages and malt products.

(4) No supplier, wholesaler, distributor, manufacturer or importer shall by oral or written contract or agreement, expressly or impliedly fix, maintain, coerce or control the resale price of alcoholic liquor, beer or cereal malt beverage to be resold by such wholesaler, distributor, manufacturer or importer, except that a licensed distributor may furnish to retailers lists of the minimum bottle and case prices required under subsection (2) of K.S.A. 1979 Supp. 41-1117 and amendments thereto.

(5) Any supplier, wholesaler, distributor or manufacturer violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than five hundred dollars ($500) and not more than one thousand dollars ($1,000), to which may be added not to exceed six (6) months imprisonment. In addition, any supplier, wholesaler, distributor, manufacturer or importer violating the provisions of this section relating to fixing, maintaining or controlling the resale price of alcoholic liquor, beer or cereal malt beverage shall be liable in a civil action to treble the amount of any damages awarded plus reasonable attorney fees for the damaged party.

§ 41-1101. Discrimination in sales, services or prices unlawful; statement to be filed; duties of director; exception.

(1) It shall be unlawful for any distributor licensed under this act to purchase any alcoholic liquor from any manufac-

turer, owner of alcoholic liquor at the time it becomes a marketable product, exclusive agent of such manufacturer or owner or distributor of alcoholic liquor bottled in a foreign country either within or without this state, unless such manufacturer, owner, exclusive agent or distributor shall file with the director a written statement sworn to by such manufacturer, owner, exclusive agent or distributor or, in case of a corporation, one of its principal officers, agreeing to sell any of the brands or kinds of alcoholic liquor manufactured or distributed by such manufacturer, owner, exclusive agent or distributor to any distributor licensed in this state and having a franchise to distribute such alcoholic liquor pursuant to K.S.A. 1979 Supp. 41-410, to make such sales to all such licensed distributors in this state at the same current price and without discrimination and to file price lists showing the current prices in the office of the director as often as may be necessary or required by the director but at least once each three months. If any manufacturer, owner, exclusive agent or distributor making such agreement violates such agreement by refusing to sell such alcoholic liquor to any such franchised licensed distributor in this state or discriminates in current prices among such franchised licensed distributors making or attempting to make purchases of alcoholic liquor from such manufacturer, owner, exclusive agent or distributor, the director shall notify, by registered mail, each such franchised licensed distributor in this state of such violation. Thereupon, it shall be unlawful for such a franchised licensed distributor in this state to purchase any alcoholic liquor from such manufacturer, owner, exclusive agent or distributor. If thereafter such a franchised licensed distributor shall purchase any alcoholic liquor from such manufacturer, owner, exclusive agent or distributor such franchised licensed distributor's license shall be revoked by the director. If any manufacturer, owner, exclusive agent or distributor of alcoholic liquor bottled in a foreign country making any agreement hereunder shall not have a sufficient supply of alcoholic liquor of any of the brands or kinds which such manufacturer, owner, exclusive agent or distributor manufactures or distributes to supply the demands of all licensed distributors having a franchise to distribute such alcoholic liquor, such manufacturer, owner, exclusive agent or distributor may ration such alcoholic

liquor and apportion the available supply among such franchised licensed distributors purchasing or attempting to purchase the same, in accordance with a plan which shall be subject to the approval of the director. The provisions of this subsection relating to the filing of price lists with the director shall not apply to any manufacturer with respect to alcoholic liquor manufactured or bottled in a foreign country.

(2) It shall be unlawful for any retailer licensed under this act to purchase any alcoholic liquor from any distributor licensed under this act unless such distributor shall file with the director a written statement sworn to by such distributor, or in case of a corporation by one of its principal officers, agreeing to sell any of the brands or kinds of alcoholic liquor distributed by such distributor and to provide service in connection therewith to any licensed retailer whose licensed premises are located within the geographic territory of such distributor's franchise for such alcoholic liquors, unless written approval to do otherwise is obtained from the director; to make such sales to all such licensed retailers at the same current bottle and case price and without discrimination; and to file price lists showing the current bottle and case price in the office of the director as often as may be necessary or required by the director but at least once each three months. If any distributor making such agreement violates such agreement by refusing to sell or provide service to any such licensed retailer in this state without written approval of the director or discriminates in current prices among such licensed retailers making or attempting to make purchases of alcoholic liquor from such distributor, the director shalll revoke the license of such distributor. If any licensed distributor making any agreement hereunder shall not have a sufficient supply of alcoholic liquor of any of the brands or kinds which such distributor distributes to supply the demands of all such licensed retailers such distributor may ration such alcoholic liquor and apportion the available supply among such licensed retailers purchasing or attempting to purchase the same, in accordance with a plan which shall be subject to the approval of the director.

(3) The provisions of this section shall not apply to any distributor of beer or any manufacturer or importer of beer, whether within or without this state, with respect to beer distributed or manufactured by such distributor, manufacturer or importer.

§ 41-111. Regulation of retail mark-ups; legislative findings.

In the public interest and in order to promote the orderly sale and distribution of alcoholic liquor, to foster temperance and to promote the public welfare, the legislature finds: (a) That sales prices of alcoholic liquor sold by manufacturers and others to distributors licensed in this state should be no higher than the lowest price for which the same is sold to distributors anywhere in the continental United States; and (b) that minimum mark-ups on alcoholic liquor sold by retailers licensed in this state should be determined and regulated by law.

§ 41-1114. Same; minimum retail mark-ups.

The board shall establish minimum mark-ups which shall be charged by retailers on sales of alcoholic liquor to consumers.

§ 41-1115. Same; minimum mark-ups on cases, bottles, mixed cases.

The board, in exercising its powers and duties under the provisions of this act, shall establish the minimum mark-up by retailers on sales of cases, bottles and mixed cases to consumers.

§ 41-1116. Same; establishment of minimum mark-ups; guidelines; samplings, studies.

The minimum mark-ups established by the board shall be fair and reasonable to licensed retailers and the ultimate consumer. Such mark-ups must be in the public interest and such that they do not unduly stimulate the sale and consumption of alcoholic liquor or tend to disrupt the orderly sale and distribution of alcoholic liquor. The board in establishing minimum mark-ups shall take into consideration and be guided by the following: (a) The mean of acquisition costs of licensed

retailers; (b) federal, state and local taxes and license fees which are paid by retailers and are levied or imposed in connection with their business of selling alcoholic liquor in this state; (c) the mean of selling costs of licensed retailers; (d) the mean of any legitimate, reasonable expense not hereinbefore specified, incurred in the legal conduct of licensed retailers' businesses; and (e) a reasonable profit for licensed retailers. The board may base its determination of the mean of retailers' acquisition costs, selling costs and operating expenses on a sampling of retailers generally representative of all retailers in the state. To insure that retailers in this state receive only a reasonable mark-up and profit, the alcoholic beverage control board of review, within six (6) months after the effective date of this act, shall conduct and complete studies to determine whether the present minimum mark-ups prescribed for licensed retailers should be maintained as currently established, increased or decreased. Until such studies are completed, the minimum mark-ups in effect immediately prior to the effective date of this act shall remain in effect.

§ 41-1117. Same; filing, publication and distribution of minimum mark-ups; effective date; less than minimum mark-up, when permitted.

(1) Whenever the board shall establish minimum retailer mark-ups, it shall immediately file a copy thereof with the director. The director, at least once in each quarter of each year, shall publish such minimum mark-ups and shall promptly mail a copy to each licensed distributor and retailer authorized to do business in this state. Minimum mark-ups shall become effective at twelve (12) o'clock midnight on the last day of the first calendar month commencing after the seventh (7th) day following the day such mark-ups are mailed to licensed retailers.

(2) No retailer shall sell, directly or indirectly, any alcoholic liquor at less than its current posted bottle cost plus minimum mark-up without first having obtained from the director a permit so to do; and the director is authorized to issue such a permit in the following cases:

(a) where the retailer is actually closing out his or her stock for the purpose of completely discontinuing sale of

such item of alcoholic liquor for a period of not less than twelve (12) months;

(b) where the item of alcoholic liquor is damaged or deteriorated in quality and notice is given to the public thereof; or

(c) where the sale of the item of alcoholic liquor is by an officer acting under the order of any court.

§ 41-411. Same; sale of liquor on hand at time franchise law takes effect.

(1) Notwithstanding any contrary provision of this act, for a period of one hundred twenty (120) days after this act takes effect a licensed distributor may sell any alcoholic liquors which such distributor may have on hand at the time this act takes effect in the same manner and to the same purchasers as such distributor was authorized to sell the same prior to the effective date of this act.

(2) This section shall be part of and supplemental to the Kansas liquor control act.

§ 41-412. Severability.

If any provisions of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and, to this end, the provisions of this act are severable.

§ 41-719. Consumption of alcoholic liquor in public places prohibited; exceptions; penalties.

(a) Except as provided in subsection (b), it shall be unlawful for any person to drink or consume alcoholic liquor upon the public streets, alleys, roads or highways; in beer parlors, taverns, pool halls or places to which the general public has access, whether or not an admission or other fee is charged or collected; upon property owned by the state or any governmental subdivision thereof; or inside vehicles while upon the public streets, alleys, roads or highways.

(b) The provisions of subsection (a) shall not apply to the drinking or consumption of alcoholic liquor:

(1) Upon real property leased by a city to others under the provisions of K.S.A. 12-1740 to 12-1749, inclusive, and any amendments thereto, if such real property is actually being used for hotel or motel purposes or purposes incidental thereto.

(2) In any state owned or operated building or structure and upon the surrounding premises which are furnished to and occupied by any state officer or employee as a residence.

(3) Upon property owned or operated by an airport authority created pursuant to chapter 27 of the Kansas Statutes Annotated.

(4) Upon property exempted from the provisions of subsection (a) pursuant to subsection (c) or (d).

(c) Any city having a population of more than two hundred thousand (200,000) may exempt, by ordinance, specified property, title of which is vested in such city, from the provisions of subsection (a).

(d) The board of county commissioners of any county having a population of not less than one hundred and fifty thousand (150,000) may exempt, by resolution, specified property, the title of which is vested in such county, from the provisions of subsection (a).

(e) Any person violating the provisions of subsection (a) shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than fifty dollars ($50) nor more than two hundred dollars ($200) or by imprisonment for not more than six (6) months, or both.

APPENDIX H

CITATIONS TO THE PRIMARY SOURCE LAWS OF THE VARIOUS STATES

Arizona:

Ariz. Rev. Stat. Ann. § 4-243.01.

Arkansas:

Ark. Stat. Ann. § 48-305.

Colorado:

Colo. Rev. Stat. § 12-47-128(2)(c) & (3).

Connecticut:

Conn. Gen. Stat. Ann. § 30-63 (West).

District of Columbia:

Regulations of the Alcoholic Beverage Control Board tit. 3, ch. 1, Section 4.11.

Florida:

Fla. Stat. Ann. §§ 564.045, 565.095 (West).

Illinois:

Ill. Ann. Stat. ch. 43, § 126 (Smith-Hurd).

Louisiana:

La. Rev. Stat. Ann. § 26-370B (West).

Maryland:

Regulations of the Comptroller of the Treasury, tit. 03, subtitle 02, chapter 01, Section 03.02.12.

Missouri:

Mo. Ann. Stat. § 311.275 (Vernon).

Nebraska:

Neb. Rev. Stat. § 53-130.

New Jersey:

N.J. Admin. Code § 13:2-36.4.

North Dakota:

Regulations of the North Dakota State Treasurer, Section 84-02-01-04.

Rhode Island:

R.I. Gen. Laws § 3-6-16.

Texas:

Tex. Alco. Bev. Code Ann. § 37.10 (Vernon).

Wisconsin:

Wis. Stat. Ann. § 176.17(7) (West).